Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-2053

DAVID JOHN SINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

PETER BROWN,
BROWN, BARON & MADDEN,
420 South Beverly Drive,
Beverly Hills, Calif. 90212,
Attorneys for Petitioner.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1979

No._____

DAVID JOHN SINN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

David John Sinn, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinion Below.

The opinion of the United States Court of Appeals for the Ninth Circuit is unreported. A copy of the opinion appears in Appendix A hereto.

Jurisdiction.

The judgment of the Court of Appeals was entered on 19, February 1980. A timely petition for rehearing was denied on 5, May 1980. A copy of the decision of the Court of Appeals appears in Appendix B hereto.

Petitioner was under the reasonable belief that his petition for a writ of certiorari would be considered timely filed if so filed within 90 days of the decision with regard to the petition for rehearing. In that petitioner has been advised otherwise, this petition for a writ of certiorari is not considered timely filed and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Questions Presented.

1. Whether the court below properly construed its decision and the law in *United States v. Perez* (1974) 491 F.2d 167 where it held that the relevant factor is the type of activity undertaken, not the identity of the drugs.

2. Whether the court below properly construed its decisions and the law in *United States v. Goodwin* (1974) 492 F.2d 1141; *Boyer v. United States* (1942) 132 F.2d 12, *United States v. Broadway* (1973) 477 F.2d 991; *United States v. Krohn* (1977) 560 F.2d 29 and *United States v. Brashier* (1976) 548 F.2d 1315 in determining that the prior offense was not too remote in time and that its probative value was not outweighed by any potential prejudice.

3. Whether the court correctly ruled in its reliance on *United States v. Hernandez-Miranda* (1979) 601 F.2d 1104 and *United States v. Herrell* (1979) 588 F.2d 711 that appellant's previous unrelated prior offense is relevant on the issue of knowledge of the participation in the within second offense.

Statutes Involved.

Sections 403 and 404(b) of the Federal Rules of Evidence;
21 U.S.C. 952(a);
21 U.S.C. 960(a)(1); and
21 U.S.C. 841(a)(1).

Statement.

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on both counts of an indictment charging the defendant David John Sinn with possession with intent to distribute a narcotic drug controlled substance, and importation of a narcotic drug controlled substance in violation of Title 21, U.S.C. Sections 841(a) and 952(a), 960(a)(1). Defendant David John Sinn was sentenced to the custody of the Attorney General for a period of three years to be followed by a Special Parole term of three years.

On 6, November 1978 at approximately 6:30 a.m., Braniff Airlines arrived at Los Angeles International Airport from Ecuador. Passengers arriving on that flight, including the defendant Sinn, proceeded to the U.S. Customs inspection area. [R.T.* 29-30.]

James Harold Edmundson, a U.S. Customs inspector, was one of the officers that took a look at the camera case that defendant had in his possession. [R.T. 4.] Edmundson testified that he did not believe the camera case was unusually thick for that type of case until he removed the contents and opened up said case. [R.T. 5/7-12.]

Edmundson further testified he was unable to determine whether the separation in the camera case was solid or hollow until after the officers drilled it and found what was proven to be cocaine. [R.T. 6/22-25, 7/1-3.]

The government intended to move to bring in evidence of a prior act of defendant pursuant to Rule 404(b) of the Federal Rules of Evidence to show, or to prove motive, opportunity, intent, preparation, plan, knowledge, or ab-

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*"R.T." refer's to the reporter's official transcript of petitioner's trial.

sence of mistake. A limiting instruction was also requested by the government.

Defense counsel objected to the ultimate use of the evidence as a prior similar act, but if overruled would stipulate to the officer's testimony.

Defense counsel's contention and objection with respect to the admission of this into evidence as a prior similar is as follows:

First, it was based on time. The prior act occurred back in 1973, somewhere in excess of 5 years, at which point during which time it was said counsel's understanding that there was absolutely no prior conduct of the same nature engaged in on behalf of the defendant.

Secondly, the objection was based on the fact that the rules provide that in the event the Court makes a determination that the prejudicial value far exceeds the probative value, the Court cannot have this admitted into evidence for this purpose.

Said objection was raised both with respect to admitting the evidence as a prior similar act as well as for impeachment purposes when the defendant takes the stand. In particular, with respect to said prior similar, it seems that because of the passage of time, because of the subsequent, up to the time, clean record of defendant, it would seem that if ever there was a case that certainly would prejudice the defendant, it would be this introduced against him. [R.T. 110-112/1-15.]

The Court in response to defense counsel's argument stated that there was another side and that defendant wants the jury to believe he very innocently brought the subject contraband in this country not knowing it was secreted in the case that he carried with him. The Court further stated it was not sure that the rules of evidence call for assisting

a defendant putting over something on a trier of fact, and to that extent the prejudice argument fails. [R.T. 112/16-23.]

In response, defense counsel suggested that the contention of defendant is not going to be that he does not know what cocaine is or that in fact cocaine is a drug that should not be possessed. Defendant's contention is that he never knew it was in the case.

Defense counsel further stated that the prior evidence would address itself to the fact he knows what cocaine is—it was a possesson of cocaine and not with intent to sell or distribute. It was not importation of cocaine, it was mere possession that defendant pled guilty to in 1973.

The Court then stated that the basis of the present charge is possession, which defendant disputes and which he wants to urge was an accidental possession, and that is what 404 (b) allows a limiting instruction to address itself to.

The Court then permitted the evidence in because it is appropriate and overruled the objections that defense counsel stated. [R.T. 112/24-25, 113, 114/1-2.]

With regard to impeachment of defendant, the Court stated that if the defendant took the stand and testified, the government may on cross-examination ask said defendant if it was not true that on a certain date in 1973 he was convicted on the felony of, and then state the felony. [R.T. 114/3-25, 115/1-2.]

The Court further made clear that the government will give the jury an instruction showing the limited acceptance of the evidence that is the subject of the above-mentioned stipulation. [R.T.115/5-8.]

The following proceedings were held in open court within the presence and hearing of the jury.

The government stated the narrow and limited purpose of the evidence to the jury reciting Rule 404(b) of the Federal Rules of Evidence. [R.T. 115/21-25, 116/1-21.]

The stipulation between the parties provided in pertinent part as follows:

That an Officer York in an undercover capacity drove to a certain apartment and met with 3 individuals who provided said officer with 32 grams of cocaine. Officer York went to his automobile and returned moments later with several police officers. When the door was opened and the officers identified themselves, they placed everyone in the room under arrest.

Defendant had not been present in the room until Officer York came back in with the police officers.

> "As officers entered the front room they observed the defendant run from the front room into the bedroom area of the apartment. One of the officers entering the apartment, officer Michael Campbell of the Torrance Police Department's pursued the defendant when he ran from the front room into the bedroom area of the apartment. When officer Campbell entered the north-east bedroom to take the defendant into custody he observed defendant standing on a waterbed and attempting to open up the window above the bed. Officer Campbell pulled the defendant down from the window, and Sinn landed on the bed. At that time Officer Campbell observed defendant place a small plastic bag between the bed frame and the mattress of the bed.
>
> Officer Campbell took him into custody, removed a clear plastic bag containing a white powder from underneath the bed where he observed Sinn place his package.
>
> The white powdery substance found by Officer Campbell was tested by police officers and determined to be cocaine."

With that, the government rested. [R.T. 117-119.]

Defendant David John Sinn was called as a witness in his own behalf.

On direct examination, defendant testified that all his camera equipment fit into the case. He also stated he put in his business cards, passport and customs papers. Defendant stated he had knowledge that when he entered the country he would have to show his passport and things of that nature.

When he approached the customs line he had to open the case for the inspectors. The reason he claims he had to open said case was because said defendant's passport was inside. [R.T. 129-130.]

After one of the agents informed defendant of the evidence of cocaine inside the camera case, defendant went to another room with said agents as he was told. The agents had hammers and screw drivers in order to break the camera case open. The defendant observed the agents tear the case apart, and said defendant observed a substance; identified to him as cocaine in compartments inside the camera case.

On direct examination defendant admitted he knew what cocaine was and that he was convicted of a felony in 1974. [R.T. 133-134.]

With regard to some of the statues that came through customs, which were the rightful possessions of defendant, defendant realized that the statues had been broken and extensively drilled. In fact, one of said statues had a drill bit permanently stuck in the back of the statue. Defendant testified that there was no such damage or drill bit in the statue when he bought same. [R.T. 138.]

Defendant further testified that he did not know the camera case had cocaine in it. That Mr. Jones never told defendant about the cocaine, nor did said defendant ever touch the subject cocaine. [R.T. 140.]

With respect to Mr. Jones making arrangements to get back the cocaine, defendant gave him his correct name, telephone number and address. [R.T. 144 and 145.]

REASONS FOR GRANTING WRIT.

1. Petitioner argues the court incorrectly ruled in its reliance on *United States v. Hernandez-Miranda* (1979) 601 F.2d 1104 and *United States v. Herrell* (1979) 588 F.2d 711. The court's reliance indicates that any prior offense may be introduced into evidence on the sole contention that the defendant had knowledge of contraband whether or not the same in both offenses. In the event this interpretation is held correct, then there would be virtually no bar to introducing any type of prior offense into evidence.

2. Petitioner further argues that the court failed to properly construe *United States v. Perez* (1974) 491 F.2d 167 which held that the relevant factor is the type of activity undertaken, not the identity of the drugs. Petitioner contends that aside from the fact both offenses involved cocaine there was no further similiarity. The first offense or activity was mere possession at a residence while the subsequent offense concerned importation and distribution of cocaine while entering the United St tes from Ecuador. Said factual circumstances clearly establish that the prior offense which occurred approximately five years before the latter offense must be considered remote.

3. Petitioner argues that the court failed to properly construe its decisions and the law in *United States v. Goodwin* (1974) 492 F.2d 1141; *Boyer v. United States* (1942) 132 F.2d 12; *United States v. Broadway* (1973) 477 F.2d 991; *United States v. Krohn* (1977) 560 F.2d 29 and *United States v. Brashier* (1976) 548 F.2d 1315 in determining that the prior offense was not too remote in time and that its probative value was not outweighed by any potential prejudice. The similarity between the above cases and the instant cases clearly establishes the incorrect decision and abuse of discretion of the Court of Appeals.

Conclusion.

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and ruling of the Court of Appeals of the Central District of California.

Respectfully submitted,

BROWN, BARON & MADDEN,

PETER BROWN,

Attorneys for Petitioner.

APPENDIX A.

Memorandum.

United States Court of Appeals, for the Ninth Circuit. United States of America, Plaintiff-Appellee, v. David John Sinn, Defendant-Appellant. No. 79-1346.

Filed: Feb. 19, 1980.

Appeal from the United States District Court for the Central District of California.

Before: KENNEDY and HUG, Circuit Judges, and SMITH*, District Judge.

Appellant was convicted of possession of cocaine with intent to distribute (21 U.S.C. § 841(a)(1)) and of knowingly importing cocaine (21 U.S.C. §§ 952(a) and 960(a)(1)).

Appellant was apprehended at the Los Angeles airport following a flight from Ecuador and was found carrying a camera case in which was concealed 419.3 grams of cocaine, 73% pure. The only defense was that defendant did not know that the cocaine was in the camera case. The evidence was sufficient to convict, and the only problem is whether the district court erred in admitting evidence of prior misconduct.

It was shown over objection that about five years previously appellant had been in possession of cocaine during an illegal buy-and-sell transaction. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. Such evidence, however, may be admitted for the purpose of proving intent or knowledge. Fed. R. Evid. 404(b). *United States v. Hernandez-Miranda*, 601 F.2d 1104 (9th Cir. 1979). Whether evidence of prior crimes

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*The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.

should be admitted is a problem of relevancy, and as to it there is some discretion in the trial court. *United States v. Herrell*, 588 F.2d 711 (9th Cir. 1978), *cert. denied*, 440 U.S. 964 (1979). Where, as here, the sole question is one of intent, we think it within the discretion of the trial court to decide that a previous dealing is relevant on the issue of the knowledge of the participant in a second event, particularly where, as here, there was substantial evidence from which knowledge might be inferred apart from the prior act. We do not believe that *Hernandez-Miranda* requires a different result. In that case the first offense involved marijuana on the person, while the second involved heroin hidden in a car. Here, in both the prior and the subsequent offenses, the identical drug was involved and was found on the person of the appellant.

The judgment is affirmed.

APPENDIX B.

Order.

United States Court of Appeals, for the Ninth Circuit. United States of America, Plaintiff-Appellee, v. David John Sinn, Defendant-Appellant. No. 79-1346.

Before: KENNEDY and HUG, Circuit Judges, and SMITH*, District Judge.

The petition for rehearing is denied.

Filed: May 5, 1980.

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*The Honorable Russell E. Smith, Senior United States District Judge for the District of Montana, sitting by designation.